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Western Contracting Corp et al v. Industrial Commission of Utah and Leo A. Davis : Plaintiffs' Reply Brief

Utah Supreme Court

A. Pratt Kesler; Clyde, Mecham & Pratt; Attorneys for Petitioners;

IN THE SUPREME COURT OF THE STATE OF UTAH

WESTERN CONTRACTING CORPORATION (Employer) and EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, (Carrier),

Plaintiffs,

— vs. —

INDUSTRIAL COMMISSION OF UTAH and LEO A. DAVIS,

Defendants.

Case No. 9970

PLAINTIFFS' REPLY BRIEF

Appeal From Decision of
The Industrial Commission of Utah

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This brief is filed in accordance with Rule 75(p), Utah Rules of Civil Procedure in order that response may be made to what plaintiffs believe are misstatements in defendants' brief of (1) the rationale of certain cases therein cited, and (2) the underlying philosophy of the compensation acts.

ARGUMENT

POINT I.

THERE IS NO MODERN TREND TOWARD EVALUATION OF EYE IMPAIRMENT ON AN UNCORRECTED BASIS. THE SCHISM REMAINS.

Defendants suggest, on page 8 of their brief, that there has been a recent and general judicial acceptance of the proposition that visual disability should be evaluated without reference to correctibility, so that Professor Schneider's statement (quoted at page 4 of plaintiffs' brief) is no longer valid.

We will concede, of course, (since we first cited the annotations which discuss it) that there is a sharp division of authority on the issue which here concerns us. We do not perceive that the schism is becoming less pronounced, but we submit that, if it is, it is because more courts are becoming persuaded that evaluation without reference to correctibility does violence to basic compensation principles and common sense.

What constitutes the "weight" of authority may be decided on either a quantitative or qualitative approach. The editors of American Jurisprudence still, as of 1963, consider it to be the view of "most authorities" that the degree of impairment should be determined on a corrected basis. (See statement on page 5 of plaintiff's brief.) Some of the very cases cited by defendants as most strongly supporting their position are distinguishable on their facts from the instant case. In *Otoe Food Products* v. *Cruickshank,* 141 Neb. 298, 3 N.W. 2nd 452, for instance, the claimant's injured eye could be improved in acuity by an optical lens, but it could not be made to coordinate with his other eye. Defendants cite *Livingston* v. *St. Paul Hydraulic Hoist Company,* 203 Minn. 62; 270 N.W. 829, which has since been reviewed and its doctrine restated by the Minnesota Court. In

Yureko v. *Prospect Foundry Company,* 115 N.W. 2nd 477, (May 11, 1962) that Court considered a claim for total disability benefits where good vision could be restored with glasses. The opinion unequivocally places Minnesota among the jurisdictions holding that correctibility should be considered when eye disability is evaluated. At page 483, Justice Nelson, speaking for a unanimous Court, says:

> "In determining the extent of injuries to vision resulting from an industrial accident, correction by glasses may be taken into consideration."

If a trend can be discerned in recent cases, it is toward the position that disability should be determined with due consideration for correctibility. This trend is particularly to be noted in cases where an eye is injured which was previously industrially blind without glasses and because of the injury, can no longer be made effective by corrective lenses. In Illinois (*Lambert* v. *Industrial Commission,* 411 Ill. 593; 104 N. E. 2nd 783) and Virginia (*Walsh Construction Co.* v. *London,* 80 S.E. 2nd 524) the Courts have very recently held that an eye, industrially blind without correction but functional with glasses, is not really blind and that the workman whose eye is injured so that it is no longer correctible is entitled to full compensation.

These cases bring dramatically to our attention that there is another side to the coin. If we are to conclude that correctibility is not to be considered in compensation cases, we must also conclude (if we are to be consistent) that a workman who is blind without glasses but has good

vision with them has lost nothing if he sustains an injury which deprives him of the capacity to see with glasses. Defendants would ask this Court to find that such a workman was already blind within the meaning of the compensation acts.

There are cases which come to a contrary and, we believe, ill-reasoned conclusion, but the Courts which have demonstrated perception of the entire problem have recognized a basic and irrefutable difference between correctible and uncorrectible blindness.

As has already been pointed out (page 8 of plaintiffs' brief) this Court has previously indicated its approval of the language of *Cline* v. *Studebaker Corporation* where the Michigan Court said that correctible blindness is not blindness at all. The Tenth Circuit Court of Appeals, when confronted with a loss of vision case arising in Utah, had no hesitation in stating its opinion. "We may assume, and it is our opinion," said Judge Cotteral, ". . . appellee, having only a partial loss of vision which was subject to correction by the use of glasses, did not sustain a total disability." (*United States Smelting Co.* v. *Evans,* 35 F. 2nd 459.) Whenever a Court in this jurisdiction has made a statement relevant to the issue in this case, it has indicated its approval of the *Cline* v. *Studebaker* position.

POINT II.

THE PURPOSE OF THE COMPENSATION ACTS IS TO PROVIDE A SUBSTITUTE FOR EARNING POWER LOST BY REASON OF

INDUSTRIAL INJURY. IT IS NOT THEIR PURPOSE TO AWARD DAMAGES FOR INJURY.

Defendants have urged that this Court adopt an approach to Workmen's Compensation in harmony with the philosophy of that old N.A.C.C.A. spokesman and warrior, Samuel Horovitz. Defendants quote from a 1947 article of Mr. Horovitz in which he contends the "current trend" is to treat compensation cases as personal injury cases. Such statements have generally horrified those whose view of workmen's compensation is more objective. Cornell University's Professor Arthur Larson, whose "Law of Workmen's Compensation" (Mathew Bender, 1952) is perhaps the most respected work on the subject, has this to say in that treatise:

> "Once you decide to make awards for bodily impairments unrelated to earning capacity, where do you stop, and on what basis do you calculate the amount of the award? Let us say, for example, that a court decides to make an award for a scar on claimant's abdomen which his business associates will never see — what is the measure of compensation? There is only one available guide, common-law damages; but surely it would be unthinkable to give full common-law damages for non-disabling injuries while concededly awarding only a fraction of such damages for disabling injuries. How much is the South Carolina court, having announced that loss of a tooth is compensable even it does not affect appearance, prepared to offer for loss of one rear molar which no one ever sees except claimant's dentist? The erratic amounts awarded in cases approaching this problem give some indication of what happens when you abandon one principle without putting another

> in its place. In the South Carolina case, $800 was awarded for four teeth; $200 was awarded for the same number in the Oklahoma case; while in a Missouri case $50 was allowed for the loss of thirty-one teeth."
>
> (Page 50, Volume II, Section 52.32)

In compensation cases, it is seldom considered appropriate to restate basic principles as a foundation for the decision. When Courts do talk about the underlying philosophy of compensation, however, they are usually direct. For example, the Minnesota Court (for which defendants seem to have particular affection) made this statement in *Miller* v. *Mutual Life Insurance Company*, 206 Minn. 221; 289 N.W. 299:

> "In Workmen's Compensation cases, the object of the law is to provide benefits to the injured employee during disability irrespective of the employer's fault. The law does not contemplate benefits if the employee can be restored to industrial capacity."

The Horovitz concept has not been enthusiastically endorsed by the bench or the writers in this field, and it should not be adopted by this Court now.

Respectfully submitted,

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